66 FLRA No. 80

AMERICAN FEDERATION
OF GOVERNMENT EMPLOYEES
LOCAL 3294
(Union)

and

UNITED STATES
DEPARTMENT OF HOUSING
AND URBAN DEVELOPMENT
(Agency)

0-AR-4725

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DECISION

January 10, 2012

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Before the Authority: Carol Waller Pope, Chairman, and Thomas M. Beck and Ernest DuBester, Members[1]

I. Statement of the Case

This matter is before the Authority on exceptions to an award of Arbitrator Joseph W. Duffy filed by the Union under § 7122(a) of the Federal Service Labor-Management Relations Statute (the Statute) and part 2425 of the Authority's Regulations. The Agency filed an opposition to the Union's exceptions.

The Arbitrator mitigated the Agency's suspension of the grievant, but denied the Union's request for an award of attorney fees. For the reasons that follow, we set aside the denial of fees and remand the award to the parties for resubmission to the Arbitrator, absent settlement.

II. Background and Arbitrator's Award

The Agency suspended the grievant for ten days, and the Union filed a grievance that was submitted to arbitration on the stipulated issue of whether the ten-day suspension was for just cause, and, if not, what should the remedy be. Award at 3. The Arbitrator found that the grievant had engaged in the misconduct with which he was charged. *Id.* at 7-12. Accordingly, the Arbitrator assessed the reasonableness of the penalty. In this regard, the Arbitrator reviewed the Agency's analysis of the factors set forth by the Merit Systems Protection Board (MSPB) in *Douglas v. Veterans Admin.*, 5 M.S.P.R. 280 (1981) (*Douglas* factors).[2] *Id.* at 13-16. The Arbitrator determined that the Agency failed to consider certain factors as mitigating factors in the grievant's favor, specifically: (1) the grievant's job level and type of employment; (2) the grievant's past disciplinary record; and (3) the notoriety of the offense or its impact upon the reputation of the Agency. *Id.* at 14-15. In addition, the Arbitrator considered the Agency's conclusions with respect to another factor -- the adequacy and effectiveness of alternative sanctions to deter such conduct in the future by the grievant or others -- to be "open to question." *Id.* at 16. Based on the foregoing, the Arbitrator concluded that the ten-day suspension was excessive and directed the Agency to reduce the penalty to a one-day suspension. *Id.* at 17.

Regarding the Union's request for an award of attorney fees, the Arbitrator first concluded that the grievant had prevailed. The Arbitrator next addressed whether an award of fees was warranted in the interest of justice under the criteria established by the MSPB in *Allen v. USPS*, 2 M.S.P.R. 420 (1980) (*Allen*).[3] *Id.* at 18. The Arbitrator considered under criterion 5 of *Allen* whether the Agency knew or should have known that it would not prevail on the merits when it suspended the grievant. The Arbitrator concluded that the criterion was not satisfied because the Agency "made a good faith mistake in its application of the *Douglas* factors[,] and the evidence in the record [did] not support a finding that the [Agency] knew or should have known that it would not prevail on the merits[.]" *Id.* In addition, he concluded that fees were not warranted under the other *Allen* criteria and were not warranted under the Statute. *Id.* Accordingly, the Arbitrator denied the request for an award of attorney fees. *Id.*

[1] Member Beck's dissenting opinion is set forth at the end of this decision.

[2] The *Douglas* factors are applied by agencies in selecting the penalty to impose and applied by the MSPB in evaluating whether the imposed penalty is appropriate.

[3] In *Allen*, the MSPB listed five broad categories of cases in which an award of attorney fees would be warranted in the interest of justice: (1) where the agency engaged in a prohibited personnel practice; (2) where the agency action was clearly without merit or wholly unfounded or the employee was substantially innocent of charges brought by the agency; (3) where the agency initiated the action in bad faith; (4) where the agency committed a gross procedural error; and (5) where the agency knew or should have known that it would not prevail on the merits when it brought the proceeding. *Allen*, 2 M.S.P.R. at 434-35. An award of fees is warranted in the interest of justice when any one of the *Allen* criteria is satisfied. An award of fees is also warranted in the interest of justice in cases brought under the Statute when there is a service to the federal workforce or a benefit to the public derived from maintaining the action. *E.g., U.S. Dep't of the Air Force, 355 Fighter Wing, Davis Monthan Air Force Base, Tucson, Ariz.*, 65 FLRA 219, 220 n.4 (2010) (Member Beck dissenting as to another matter).

III. Positions of the Parties

A. Union's Exceptions

The Union contends that the Arbitrator's conclusion that an award of attorney fees was not warranted in the interest of justice is contrary to law. Exceptions at 13-17. The Union asserts that, under MSPB precedent, *Allen* criterion 5 was satisfied because the Arbitrator mitigated the suspension on the basis of evidence that was before the Agency at the time of the grievant's suspension. *Id.* at 13 (citing *Lambert v. Dep't of the Air Force*, 34 M.S.P.R. 501 (1987)). In addition, the Union maintains that, consistent with the decision in *Dunn v. Department of Veterans Affairs*, 98 F.3d 1308 (Fed. Cir. 1996) (*Dunn*), it is not seeking a per se ruling that *Allen* criterion 5 was satisfied solely on the basis of the Arbitrator's mitigation of the grievant's suspension. *Id.* at 16. The Union claims that, instead, *Allen* criterion 5 was satisfied because the Agency's penalty selection was not reasonable. *Id.* at 17 (citing *Ciarla v. USPS*, 43 M.S.P.R. 240 (1990)).

The Union also contends that the award is deficient because the Arbitrator failed to set forth a fully articulated decision in denying the Union's request for attorney fees. *Id.* at 10-11.

B. Agency's Opposition

The Agency contends that the Arbitrator correctly concluded that an award of attorney fees was not warranted in the interest of justice. Opp'n at 13-17. The Agency argues that the Union has failed to demonstrate that the Agency knew or should have known that it would not prevail on its selection of the penalty. *Id.* at 16. The Agency asserts that the Arbitrator found that its decisions and actions were reasonable. *Id.* Consequently, the Agency claims that there is no basis for finding that its penalty selection was unreasonable or made in disregard of relevant facts and, therefore, no basis for finding that fees were warranted. *Id.* at 15. In addition, the Agency argues that "'penalty mitigation alone does not create a presumption in favor of satisfaction of'" *Allen* criterion 5. *Id.* at 16 (quoting *Dunn*, 98 F.3d at 1313).

The Agency also contends that the Arbitrator's decision denying the Union's request for attorney fees was sufficiently articulated. *Id.* at 9-12.

IV. Analysis and Conclusions

When an exception involves an award's consistency with law, the Authority reviews de novo any questions of law raised by the exception and the award. *E.g., U.S. Dep't of the Air Force, 355 Fighter Wing, Davis Monthan Air Force Base, Tucson, Ariz.*, 65 FLRA 219, 221 (2010) (Member Beck dissenting as to another matter) (*Davis-Monthan AFB*). In applying a standard of de novo review, the Authority assesses whether an arbitrator's legal conclusions are consistent with the applicable standard of law. *Id.*

Under the Back Pay Act (BPA), 5 U.S.C. § 5596, an award of attorney fees must be in accordance with the standards established under 5 U.S.C. § 7701(g) (§ 7701(g)).[4] Section 7701(g)(1) [5] applies to all cases except those of employment discrimination and applies in this case. *See FDIC, Chicago Region*, 45 FLRA 437, 453 (1992). According to the Union, the award is not in accordance with the standard that an award of fees is warranted when in the interest of justice. As such, we address only this requirement. *Davis-Monthan AFB*, 65 FLRA at 221.

The Authority resolves whether an award of fees is warranted in the interest of justice in accordance with § 7701(g)(1) by applying the criteria established by the MSPB in *Allen*. Under *Allen*, an award of fees is warranted in the interest of justice if any one of the criteria set forth previously is satisfied. *See supra*, note 3. In resolving whether an arbitrator properly applied the criteria, the Authority looks to the decisions of the MSPB and the United States Court of Appeals for the Federal Circuit. *Davis-Monthan AFB*, 65 FLRA at 221. The Authority looks to and follows MSPB precedent because the MSPB's interpretation of § 7701(g) is entitled to deference. *See Bennett v. Dep't of the Navy*, 699 F.2d 1140, 1146 (Fed. Cir. 1983) ("The actions of [the MSPB] are entitled to considerable

[4] The threshold requirement for an award of attorney fees under the BPA is a finding that the grievant was affected by an unjustified or unwarranted personnel action that resulted in a withdrawal or reduction in the grievant's pay, allowances, or differentials. *E.g., AFGE, Local 1923*, 66 FLRA 22, 23 n.3 (2011) (Member Beck dissenting as to another matter). In addition to requiring that an award of fees must be in accordance with the standards established under § 7701(g), the BPA further requires that an award of attorney fees must be: (1) in conjunction with an award of backpay to the grievant; and (2) reasonable and related to the personnel action. *Id.*

[5] Section 7701(g)(1) provides, in pertinent part, that the MSPB "may require payment by the agency involved of reasonable attorney fees incurred by an employee . . . if the employee . . . is the prevailing party and the [MSPB] . . . determines that payment by the agency is warranted in the interest of justice[.]"

deference when it acts to implement its statutory authority in a reasonable manner.").[6]

Under *Allen* criterion 5, the criterion cited by the Union, an award of fees is warranted in the interest of justice when the agency knew or should have known that it would not prevail on the merits when it disciplined the employee. *Allen*, 2 M.S.P.R. at 435. In disciplinary actions, the penalty imposed by the agency is an aspect of the merits of an agency's case, and fees are warranted in the interest of justice when the agency knew or should have known that its choice of penalty would not be sustained. The critical point is that an agency acts unreasonably by imposing penalties that it knows or should know will not withstand scrutiny. *Davis-Monthan AFB*, 65 FLRA at 221.

In *Davis-Monthan AFB*, the Authority found that, under MSPB precedent, when the MSPB mitigates a penalty based on evidence before, or readily available to, the agency at the time of the disciplinary action, and no new information was presented at the merits hearing that was not available to the agency at the time of the discipline, such mitigation establishes that the agency knew or should have known that its choice of penalty would not be sustained. *Id.* at 221-22 (citing *Miller v. Dep't of the Army*, 106 M.S.P.R. 547, 551 (2007) (Chairman McPhie dissenting); *Del Prete v. USPS*, 104 M.S.P.R. 429, 434-35 (2007) (Chairman McPhie dissenting)); *accord Payne v. U.S. Postal Serv.*, 79 M.S.P.R. 71, 73 (1998) ("[F]ees will generally be warranted when . . . the Board mitigates the penalty imposed, unless the Board's decision to mitigate is based upon evidence that was not presented before the agency.") (citations omitted)). In addition, the Authority noted that the MSPB has held that "by imposing an unreasonably excessive penalty, an agency acts irresponsibly and . . . knows or should know that the penalty will not survive [MSPB] scrutiny. *Davis-Monthan AFB*, 65 FLRA at 222 (citing *Hutchcraft v. Dep't of Transp.*, 55 M.S.P.R. 138, 142 (1992) (*Hutchcraft*)).

Here, the Arbitrator found that the Agency's imposed penalty was excessive because the Agency erroneously applied three *Douglas* factors and reached a questionable conclusion as to another. Specifically, the Arbitrator determined that the Agency failed to consider the grievant's job level and type of employment, the grievant's past disciplinary record, and the notoriety of the offense or its impact upon the reputation of the Agency as mitigating factors in the grievant's favor. Award at 14-15. In addition, the Arbitrator found the Agency's conclusions with respect to another *Douglas* factor -- the adequacy and effectiveness of alternative sanctions to deter such conduct in the future by the grievant or others -- to be "open to question." *Id.* at 16. Consequently, in mitigating the suspension, the Arbitrator relied solely on evidence that was before the Agency when it suspended the grievant, rather than new information that was presented at arbitration. Following MSPB precedent as the Authority did in *Davis-Monthan*, we conclude in this case that the Arbitrator's mitigation of the grievant's suspension solely on the basis of evidence that was before the Agency when it suspended the grievant establishes that the Agency knew or should have known that its choice of penalty would not be sustained. In other words, the Agency acted irresponsibly and knew or should have known that its penalty would not survive arbitral scrutiny.

Because of the principle we (and the MSPB) apply, our conclusion that the Agency knew or should have known that its choice of penalty would not be sustained is not inconsistent with the Arbitrator's finding that the Agency merely made a good-faith mistake. As discussed above, under that principle, fees are warranted when an agency's imposed penalty is mitigated on the basis of evidence before the agency at the time it took the disciplinary action. Moreover, *Dunn*, cited by the Agency and our dissenting colleague, is inapposite. In *Dunn*, the court held that there can be no per se rule that fees are warranted in the interest of justice whenever the MSPB mitigates the imposed penalty. *Dunn*, 98 F.3d at 1313. The principle we apply is different. Under that principle, an agency's choice of penalty will not be found unreasonable when the basis for the mitigation is evidence that was unavailable to the agency. *Hutchcraft*, 55 M.S.P.R. at 142-43.

We acknowledge that certain Authority precedent may be inconsistent with *Davis-Monthan* and our decision in this case. *See, e.g., NATCA*, 64 FLRA 799, 801 (2010) (union failed to meet its burden of demonstrating its entitlement to an award of attorney fees under *Allen* criterion 5). However, as our approach in *Davis-Monthan* and this case is consistent with MSPB precedent, we will no longer follow any inconsistent Authority decisions.

For the reasons set forth above, we conclude that fees are warranted in the interest of justice and that the Arbitrator's award is deficient in concluding otherwise.[7] As the Arbitrator did not make a determination as to a reasonable amount of fees, we remand the award to the

[6] Our dissenting colleague does not assert that we have failed to follow MSPB precedent. Rather, our colleague disagrees with the result we have reached by applying that precedent. Such a disagreement does not accord MSPB the deference it is due when it establishes standards under § 7701(g). For this and other reasons we have previously expressed, we do not find our dissenting colleague's position persuasive. *See AFGE, Local 1923*, 66 FLRA 22, 24 n.5 (2011).

[7] In view of this conclusion, we do not address the Union's other exception.

parties for resubmission to the Arbitrator, absent settlement, to determine that matter.

V. Decision

The Arbitrator's denial of fees is set aside, and the award is remanded to the parties for resubmission to the Arbitrator, absent settlement.

Member Beck, Dissenting:

For the reasons that I articulated in my dissents in *AFGE, Local 1923*, 66 FLRA 22, 25 (2011) (*Local 1923*) (Dissenting Opinion of Member Beck) and *United States Department of the Air Force, 355 Fighter Wing, Davis-Monthan Air Force Base, Tucson, Arizona*, 65 FLRA 219, 223 (2010) (Dissenting Opinion of Member Beck), I disagree with my colleagues' conclusion that the Arbitrator's denial of attorney fees is contrary to law.

The Majority errs in failing to consider the reasonableness of an agency's actions in selecting a penalty. *See Hilliard v. U.S. Postal Serv.*, 111 M.S.P.R. 634, 639 (2009) (Separate Opinion of Chairman McPhie) (concluding that arbitrators may choose to mitigate a penalty for myriad reasons that do not imply negligence, bad faith, or overreaching by the agency – none of which "warrant[s] an award of attorney fees"); *Payne v. U.S. Postal Serv.*, 79 M.S.P.R. 71, 74-75 (1998) (awarding fees under *Allen* criterion five only when it found that "no new information was introduced at the hearing that was unavailable to the agency before it demoted the appellant" and that the agency did not weigh the *Douglas* factors properly and made its original judgment negligently); *see also Matthews v. U.S. Postal Serv.*, 78 M.S.P.R. 523, 526 (1998) (finding that *Allen* does not create a presumption or per se rule in favor of fees whenever a penalty is mitigated). The Majority merely concludes that "fees are warranted when an agency's imposed penalty is mitigated on the basis of evidence before the agency at the time it took the disciplinary action." Majority Opinion at 5. As I stated in *Local 1923*, I believe that, by failing to consider the reasonableness of an agency's actions, the Majority effectively requires an agency to "have a crystal ball to predict precisely how an arbitrator will view the grievance." 66 FLRA at 25.

Moreover, the Majority's refusal to examine the reasonableness of an agency's choice of penalty means that *Allen* criterion five is met *automatically* whenever a penalty is mitigated. As a practical matter, evidence is rarely made available to an arbitrator that was not available to the agency when it imposed discipline – it's just that the arbitrator assigns a slightly different weight or meaning to the evidence. Thus, the consequence of the Majority's opinion is that, in employee misconduct cases, penalty mitigation alone becomes sufficient to satisfy the fifth *Allen* criterion. Yet, the Federal Circuit in *Dunn v. Department of Veterans Affairs*, 98 F.3d 1308, 1313 (1996) held that penalty mitigation alone does not create a presumption that any of the *Allen* criteria are satisfied.

Applying the correct standard, I would find that the Agency acted reasonably in light of the evidence that was available to it. In deciding the merits of the dispute, the Arbitrator found that the grievant engaged in the misconduct with which he was charged and that disciplinary action was warranted. *See* Award at 7-12, 17. The Arbitrator determined that the Agency "reasonably understood the [email] to be an implied threat and reasonably took preventative action." *Id.* at 16; *see also id.* at 8, 9, 12, 13. Similarly, in ruling on the Union's attorney fee request, the Arbitrator found that "[t]he employer made a good faith mistake in its application of the . . . factors" set forth in *Douglas v. Veterans Admin.*, 5 M.S.P.R. 280 (1981) and that "the evidence in the record [did] not support a finding that the employer knew or should have known that it would not prevail on the merits." Award at 18. Consequently, even if the evidence upon which the Arbitrator relied was available to the Agency when it disciplined the grievant, the requirements of the fifth *Allen* criterion have not been met.

In addition, I would find that the Union's additional exception – that the award is deficient because the Arbitrator failed to set forth a fully articulated decision in denying the Union's request for attorney fees – is without merit. Even assuming that the Arbitrator failed to articulate fully his reasons for denying the Union's attorney fee request, the record supports the Arbitrator's determination that an award of attorney fees is not warranted in the interest of justice because none of the *Allen* criteria is met. As the Arbitrator correctly found, the first *Allen* criterion is not met because a breach of the parties' agreement does not constitute a prohibited personnel practice. *Id.*; *see also U.S. Dep't of the Air Force, Davis-Monthan Air Force Base, Tucson, Ariz.*, 64 FLRA 819, 821 (2010). *Allen* criteria two, three, and four are clearly inapplicable because the Arbitrator found that the Agency reasonably considered the email to be an implied threat, the Agency's investigation was reasonable, and the grievant engaged in the misconduct with which he was charged. Award at 7-12, 13, 16. The fifth *Allen* criterion is not met for the reasons noted above. *Id.* at 18. And, based on Authority precedent, the sixth *Allen* criterion is clearly inapplicable. *See Laborers' Int'l Union of N. Am., Local 1376*, 54 FLRA 700, 704 (1998) (determining that the sixth *Allen* criterion was not met because the results of the case were very fact and case specific, and the benefits of the grievance were limited to the prevailing grievants).

Accordingly, I would deny the Union's exceptions.